INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	11
Conclusion	13

CITATIONS

Cases:	
Red Arrow Freight Lines, Inc., et al., 77 NLRB 859, enforced, 180 F. 2d 585, certiorari denied, 340 U.S. 823	2
Universal Camera Corp v. *National Labor Relations Board*, 340 U.S. 474	12, 13
Statute:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)	2
Section 8(a)(3) and (1)	3, 12

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 141

RED BALL MOTOR FREIGHT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* order of the court of appeals (Pet. App. 41-42) is not officially reported. The Board's decision and order (Pet. App. 1-40) are reported at 143 NLRB No. 32.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41-42) was entered on March 3, 1964. The petition

for a writ of certiorari was filed on June 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the Company discriminatorily discharged seven if its employees, thereby violating Sections 8(a)(3) and (1) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the petition (Pet. 2-3).

STATEMENT

A. THE BOARD'S FINDINGS AND CONCLUSIONS

The Company is a Delaware corporation which operates as a common carrier of freight by motor vehicle in the southern and southwestern portions of the United States (Pet. App. 3). The Teamsters Union [1] has been attempting to organize the Company's drivers for many years, and the Company has strongly opposed these efforts. See *Red Arrow Freight Lines, Inc., et al*, 77 NLRB 859, enforced, 180 F. 2d 585 (C.A. 5), certiorari denied, 340 U.S. 823 (*ibid.*).

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[1] General Drivers, Warehousemen and Helpers Local Union 968 *et al.* (hereinafter the Teamsters).

The proceeding here is concerned only with employees at the Company's Dallas, Houston, and Shreveport terminals.

In early 1961, the Teamsters revived its campaign, and it was again opposed by the Company which favored the incumbent Union of Transportation Employees (U.T.E.) (Pet. App. 3-4; J.A. 335-341).[2] In November 1961, the Board conducted an election and the U.T.E. won and was recertified. On and after March 27, 1962, the Company discharged Horace Limbaugh, and six other leading Teamsters adherents. The Board found that these discharges were discriminatory, in violation of Sections 8(a)(3) and (1) of the Act. The facts as to each discharge are as follows:

1. HORACE LIMBAUGH

During 1961, Limbaugh was active on behalf of the Teamsters, signing up more than 50 drivers and serving as an observer at the Board election. His union activities were well known to his superiors, for he had been singled out by them for interrogation concerning his union sympathies and had affirmed to them his support of the Teamsters (Pet. App. 16; J.A. 36-37).

Several months after the election, Limbaugh was involved in a minor accident; he backed his truck into a bicycle which was hidden from his view. The total damage amounted to about $8 (Pet. App. 16; J.A. 40). When he reported the accident, he was told by Terminal Manager Lane that he was being suspended pending investigation. Limbaugh protested that he

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[2] "J.A." references are to the Joint Appendix printed for use in the court below, and filed with the petition.

could not afford a lengthy suspension because of pressing financial obligations and asked permission to work elsewhere during his suspension. Although Lane was aware that the suspension would probably not extend more than 24 hours and that Limbaugh would be paid in full while suspended, he did not tell this to Limbaugh but merely remarked that the length of Limbaugh's suspension was "up to the general office" and that it was "impossible under the Company's policy" for him to work elsewhere while under suspension (Pet. App. 16-17; J.A. 42-43, 183-184, 189, 192-193). By the following day, Lane had decided to return Limbaugh to duty immediately (Pet. App. 17; J.A. 195). Nevertheless, when he heard Limbaugh express fear that the Company was "out to get him" for his union activities, he suggested that Limbaugh resign and typed out a letter of resignation, which he urged Limbaugh to sign when the latter hesitated because of the loss of his seniority (Pet. App. 17; J.A. 43, 196).

The Board found that "Lane's entire course of action was calculated to bring about Limbaugh's quitting," that by so doing the Company constructively discharged him, and that the reason for the discharge was his union activities (Pet. App. 17-18).

2. HENRY LEWIS

Throughout 1961, Lewis was active on behalf of the Teamsters (Pet. App. 26; J.A. 82). In May 1961, he improperly parked a trailer, and, although it was not damaged and the Company incurred no expense,

Lewis was placed on probation with a warning that "any further act of negligence or indication of poor judgment on your part will result in your immediate dismissal" (Pet. App. 26; J.A. 83-84, 102-103). In January 1962, Lewis was severely criticized for "failing to use good judgment" in not picking up a shipment of school supplies he saw at Paris, Texas, notwithstanding that he had been instructed by the dock foreman there not to do so because another driver was scheduled to call for it (Pet. App. 26-27; J.A. 88-90).[3] Terminal Manager Lane forced Lewis, under threat of discharge, to sign a statement which contained an "admission" of poor judgment (Pet. App. 27; J.A. 90-91, 353). Two months later, Lewis claimed a $1.88 extra tonnage fee for helping to load and unload a shipment of paper.[4] The Company investigated the claim and asserted to Lewis that it had evidence, in the form of a letter from the shipper, proving that the claim was dishonest, and discharged him. It did not, however, show this letter to Lewis and it did not produce the letter at the Board hearing (Pet. App. 28; J.A. 83, 95-100, 105-106, 323-324, 361).

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[3] Company rules forbid a pickup without such authorization (J.A. 88).

[4] According to Lewis' uncontradicted testimony, after he and two other men had placed half the load in the truck, it was seen that the entire load would not fit unless the truck was repacked in another way. The three men therefore unloaded the truck and a forklift was used to repack it (Pet. App. 27; J.A. 96).

The Board found that the Company discharged Lewis because of his union activity, using the allegedly false tonnage claim as a pretext to hide its real motive (Pet. App. 28-29).

3. ELTON CATHEY

Cathey was active in the Teamsters organizing drive in 1961, signing up about 75 employees (Pet. App. 18; J.A. 53, 55-56). His activities on behalf of the Teamsters were well known to the Company (J.A. 61-62). At night, on April 1, 1962, about 70-75 miles past Shreveport, Arkansas, two outer wheels on a tractor being driven by Cathey suddenly came off, one of which rolled off the highway into a parked car, damaging it in the amount of $600 (Pet. 18; J.A. 63-66). An inspection revealed that the wheels had come off because the ten studs which protrude from the brake drum hub and which hold the inner wheel to the axle had sheared off (J.A. 65-66). On April 5, after having been dispatched on two further runs, Cathey was summoned to Safety Director Barr's office (Pet. App. 19; J.A. 70-71). Barr showed Cathey a bulletin issued to drivers and said that it required drivers to check their wheels and lugs every 75 miles. Cathey, after reading the bulletin, denied that it mentioned lugs (Pet. App. 19; J.A. 71-72).[5] Barr asked Cathey how long he had driven his rig on April 1 without checking it, and Cathey replied that he had

[5] The bulletin is entitled "Tire Fires" and deals solely with their prevention and with methods of fighting them, specifically by keeping tires properly inflated, and asks drivers to check their tires every 50 to 75 miles (J.A. 353-354).

made his last check at Shreveport, which was less than 75 miles from the scene of the accident. (Pet. App. 19; J.A. 72). Barr nevertheless requested Cathey to resign, and, when the latter refused, discharged him (Pet. App. 19; J.A. 72). Barr indicated that he had made up his mind before speaking to Cathey (Pet. App. 19-20; J.A. 70-74).

The Board—finding that Cathey had in fact complied with the Company's rules before the accident, that he had no reason to believe the truck was in any way defective, that he had so informed Barr, and that Barr had decided upon a penalty even before talking to him about the accident—concluded that Cathey was discharged because of his union activity and not for his alleged failure to check his equipment (Pet. App. 21-22).

4. WILLIAM CLEM

Clem was an active Teamsters supporter who served as an observer at the Board election on November 30, 1961 (Pet. App. 29; J.A. 107). In January 1962, Maintenance Supervisor Odum criticized Clem for spreading rumors, and the next month he tried to get Clem to transfer to Denver where the Teamsters already had a contract (Pet. App. 30; J.A. 111-112, 113-115). In April, Odum told Clem and five other trailer shop employees that they were being laid off. One laid-off employee brought up the question of bumping rights, and Clem said the others had a right to bump but that he did not because he was not a member of U.T.E. Although Odum knew

that Clem was in error and could have bumped to another job without any loss in pay, he kept quiet (Pet. App. 30-31; J.A. 115-116, 308-309).

The Board concluded that Odum deliberately failed to advise Clem of his job retention rights, even though he knew that Clem was mistaken about them, because he desired to terminate Clem on account of his union activity (Pet. App. 31-32).

5. JOE SHAMBLIN

Shamblin was expelled from the U.T.E. on October 15, 1961, and thereafter campaigned actively for the Teamsters, becoming a steward, and serving as an observer at the November 30 election (Pet. App. 22; J.A. 123, 125). On March 28, 1962, Vice President Fisk accused Shamblin of "Teamster trouble-making business" and suggested that he quit (Pet. App. 22-23; J.A. 126-127). On April 6, Terminal Manager Lane also suggested that Shamblin quit, when Shamblin charged that the Company's principal owner, Henry English, was "part of a false union" (Pet. App. 23; J.A. 127-132).

On April 25, 1962, shortly after being assigned to an LTL ("less than truck") run, Shamblin noticed that a shipment being loaded on his truck at the Western Electric Company warehouse was 15 cartons short. He pointed this out to the Western Electric employees. They denied that the shipment was short and suggested that, as the warehouse was about to close for the day, Shamblin return the following morning to straighten the matter out. He agreed

since the suggestion accorded with Company policy. Early the next day, the missing shipment was found in the Western Electric warehouse, and Shamblin picked it up (Pet. App. 23; J.A. 134-137, 148).

Five days later, Terminal Manager Lane criticized Shamblin for mishandling the Western Electric shipment. Lane accused him of being a troublemaker, again invited him to resign, and warned him that a similar mistake would cost him his job (Pet. App. 24; J.A. 139-140). That same day, Shamblin mistakenly failed to pick up six pieces of equipment at White's Auto, in a shipment comprising 300 to 400 such pieces. The following day, Lane discharged him (Pet. App. 24; J.A. 138, 141-143). In neither case did the Company suffer any financial loss. In addition, Lane testified that Shamblin was the only driver he fired for failure to pick up merchandise, despite the fact that the Company received 40 to 50 reports daily concerning shipment shortages, many of which were due to failure to pick up shipments (J.A. 120, 200).

The Board—finding that the Company's complaint over the Western Electric incident "approache[d] the trivial" and that the White incident was "of little higher stature"—concluded that the Company discharged Shamblin for his activity in behalf of the Teamsters (Pet. App. 24-25).

6. GORDON HODGKINS AND W. T. WILLINGHAM

Both Hodgkins and Willingham were active Teamsters adherents and served as observers at the November 30, 1961, election (Pet. App. 10, 12; J.A. 8-9, 155). Safety Director Barr discharged Hodgkins on

May 3, 1962, and Willingham on May 9, 1962, each allegedly for going five miles over the posted speed limits.[6]

As to Hodgkins, on the night of May 3, he was dispatched out of turn (Pet. App. 10-11; J.A. 159-160). Barr, along with Lane who had never before accompanied him, set up a radar trap in Corsicana, Texas, on Hodgkins' route to Dallas. After catching Hodgkins speeding, they reminded him of the need for regularly checking his tires but said nothing to him about observing the speed limit (Pet. App. 11; J.A. 160-162, 282-283). They returned to Dallas without checking any other drivers, although they were aware that several other Red Ball trucks were due to pass through Corsicana that night (Pet. App. 11; J.A. 285). When Hodgkins arrived at Dallas that evening, Barr told him that he had been checked doing 35 miles per hour in a 30-mile zone and that he was discharged (Pet. App. 11; J.A. 162-163).

As to Willingham, on the afternoon on May 9, Barr waited 1½ hours at the Houston dock until Willingham had loaded his truck and then followed him for almost two hours throughout the streets of Houston. When Willingham returned to the terminal, Barr summoned him to the terminal manager's office, told him that he was observed going 45 miles per hour in a 40-mile zone and then going through a stop light, and had him discharged (Pet. App. 12-13; J.A. 275-276, 293).

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[6] The Company has no set penalty for speeding (Pet. App. 7-8; J.A. 284-285).

Barr's usual practice was to spend a maximum of 30 minutes to an hour checking one truck (J.A. 275). Hodgkins and Willingham were the only drivers of the hundreds in the Company's employ discharged for traffic violations from July 1961 to May 1962 (J.A. 271). Moreover, Barr, contrary to his usual practice, discharged both men without checking into their work records, both of which were good (Pet. App. 11, 13; J.A. 166, 285). In these circumstances and in view of the evidence of union activity, the Board concluded that Hodgkins and Willingham were not discharged for speeding violations, but because of their activities in behalf of the Teamsters (Pet. App. 13-15).

B. THE BOARD'S ORDER

The Board ordered the Company to cease and desist from the unfair labor practices found, and from in any other manner interfering with the employees' organizational rights. The Board also ordered the Company to reinstate with back pay the seven employees discriminated against, and to post the usual notices (Pet. App. 34-36).

C. THE COURT OF APPEALS DECISION

The court of appeals entered a brief *per curiam* order, stating "that the decision and order of the National Labor Relations Board on review herein are affirmed" (Pet. App. 42).

ARGUMENT

The sole question presented is whether, as the court below concluded, there is substantial evidence to

support the Board's findings that seven of petitioner's employees were discharged because of their activities on behalf of the Teamsters, rather than for the reasons assigned by the Company. An evidentiary issue of this kind does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

There is no merit to petitioner's contention (Pet. 7-14) that the court below misapplied the substantial evidence standard of review by sustaining a blanket finding of discrimination which rests on nothing more than the employer's anti-union attitude and fails to take into account the good cause which existed for the discharges. The Trial Examiner's report (Pet. App. 1-38), which was adopted by the Board, shows that each discharge was individually considered and the reasons advanced by the Company to explain it were fully evaluated. The Board, as in the typical Section 8(a)(3) case, found each discharge to be discriminatory only after weighing the evidence showing an anti-union motive for the action against that showing legitimate reasons therefor, and concluding that the former was stronger.[7] Since, on the basis of the

[7] The Company's statement (Pet. 4) that the Board found that the Teamsters organization effort extended continuously from 1948 to 1961 is incorrect. The Board stated (Pet. App. 3) that such activity was "revived" in late 1960, thereby recognizing that it had been suspended earlier. Equally without substance is the claim (Pet. 4-7) that the Board's "Background" findings (Pet. App. 3-5) were the basis for the findings of discriminatory discharge. It is clear that the "Background" was used by the Board merely to shed light on the subsequent events, all of which were treated in full and on their own merits.

facts summarized above, the Board's conclusion in each instance was reasonable, the court below adhered to, rather than departed from, the principles of *Universal Camera, supra*, in permitting the Board's findings to stand.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

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JULY 1964

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